85-5542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND FLORIDA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND FLORIDA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, the American Psychological Association (hereafter "APA") and the Florida Psychological Association (hereafter "FPA") move for leave to file the attached brief *amici curiae*. Although Petitioner consented to the filing of this brief, Respondent denied consent, thereby necessitating the filing of this Motion.

The APA, a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universi-

ties in the United States. The purpose of APA, as set forth in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare . . . ." A substantial number of APA's members are concerned with clinical and forensic psychology, including the collection of data and the development of research, and engage regularly in the evaluation of the mental condition of criminal offenders.

The FPA, with over 700 members, represents the majority of psychologists in Florida and is affiliated formally with the APA. The work of FPA's members encompasses basic and applied research, teaching, and a myriad of mental health services to hospitals, courts, clinics, schools, and the community at large. Many of Florida's psychologists offer expert testimony in court proceedings in which an individual's mental or emotional state is an issue. An even larger number are involved in the study, assessment, and treatment of mental and emotional disorders and the effects of such disorders on human behavior and cognitive abilities. In this way, Florida psychologists, like psychologists nationally, bring unique qualifications to matters bearing on the case at hand. Because this case originated in Florida, and because Florida psychologists are committed to the promotion of public welfare, FPA, representing psychology in Florida, joins APA as co-*amicus*.

The APA has participated as *amicus* in many cases in this Court involving mental health issues, including *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded residents of state hospitals); *Mills v. Rogers*, 457 U.S. 291 (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion counseling by nonphysicians); and *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) (indigent defendant's right to assistance from a mental health professional). So far this Term, the APA has filed

amicus briefs in *Thornburgh v. American College of Obstetricians and Gynecologists*, No. 84-495; *Lockhart v. McCree*, No. 84-1865; and *Smith v. Sielaff*, No. 85-5487.

APA contributes *amicus* briefs to this Court only where the APA has special knowledge to share with the Court. APA regards this as one of those cases. In this instance, APA and FPA wish to inform the Court about the methodologies of psychological evaluations and the need for and use of expert testimony in post-sentencing competency proceedings. APA and FPA believe this important and relevant information will not be provided by the parties and will be of assistance to the Court in deciding this case.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND FLORIDA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set out in the attached Motion for Leave to File Brief Amici Curiae, at pp. i-iii, *supra*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises two related issues regarding the extent to which the Eighth and Fourteenth Amendments prohibit the execution of condemned prisoners who are presently mentally incompetent, and, assuming such a prohibition, the minimum procedural safeguards that must be observed in determining such individuals' competency to be executed. Determination of appropriate procedures for competency evaluations of condemned prisoners involves recognition and understanding of the roles played by mental health professionals in this context.[1] Because

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[1] Throughout this brief, *amici* use the term "mental health professional" to refer to professional psychologists, psychiatrists and other clinicians qualified by law to evaluate and present opinion testimony on the mental health issues relevant to capital cases. Expert testimony in this area by psychologists, for example, has been admissible in most jurisdictions since the 1940s, *see Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (*en banc*); *Hidden v. Mutual Life Insurance Co.*, 217 F.2d 818 (4th Cir. 1954); and *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940); *see generally* T. BLAU, THE PSYCHOLOGIST AS EXPERT WITNESS (1984); D. SHAPIRO, PSYCHOLOGICAL EVALUATION AND EXPERT TESTIMONY (1984), and has met with almost unanimous endorsement by commentators. *See* Bonnie and Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case For Informed Speculation*, 66 VA. L. REV. 427 (1980); Lassen, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A. J. 239 (1964); Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L. J. 82 (1969); Louisell, *The Psychologist in Today's Legal*

of *amici*'s strong interest and expertise in the various methodologies for cognitive assessment that are integral components of all competency evaluations, including those

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World, 39 MINN. L. REV. 235 (1955); Nash, *Parameters and Distinctiveness of Psychological Testimony*, 5 PROF. PSYCHOL. 239 (1974); Pacht, Kuehn, Bassett & Nash, *The Current Status of the Psychologist as an Expert Witness*, 4 PROF. PSYCHOL. 409 (1973); Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26-36 (G. Cooke, ed. 1980); Note, *Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity*, 8 VILL. L. REV. 119 (1962); Comment, *The Psychologist as an Expert Witness*, 15 KAN. L. REV. 88 (1966). For further discussion of this point, *see* Briefs for *Amicus Curiae* American Psychological Association in *Smith v. Sielaff*, No. 85-5487; and *Ake v. Oklahoma*, No. 83-5424.

Although some of the Court's decisions in cases involving mental health issues have referred to psychiatrists and not psychologists or other appropriately trained and licensed mental health professionals, *see, e.g., Ake v. Oklahoma*, 105 S.Ct. 1087 (1985); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Estelle v. Smith*, 451 U.S. 454 (1981); and *Parham v. J.R.*, 442 U.S. 584 (1979), other decisions properly have recognized that psychologists stand on an equal footing with psychiatrists. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982) ("professional decisionmaker" includes persons with "appropriate training" in "psychology"); *Blue Shield v. McCready*, 457 U.S. 465 (1982) (health plan subscriber denied reimbursement for psychologist's fees has standing to sue for conspiracy to exclude psychologists from psychotherapy market); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) ("[the state]'s reliance on the opinion of a designated physician or psychologist . . . ."); and *Addington v. Texas*, 441 U.S. 418, 429 (1979) (". . . which must be interpreted by expert psychiatrists and psychologists"). *Amici* assume that holdings referring solely to psychiatrists were not intended to imply that rules deemed appropriate in those cases for psychiatrists would be inappropriate for psychologists or other appropriately trained and licensed mental health professionals. However, these ambiguities have led lower courts to read *Ake* and analogous cases too narrowly. *See, e.g., Lindsey v. State*, 254 Ga. 444, 330 S.E. 2d 563 (1985) (*Ake* not satisfied by providing defense with access to examination by a mental health expert other than a psychiatrist). To dispel any confusion that these ambiguities may have engendered among lawyers and judges on this point, *amici* urge the Court to use a more neutral and descriptive phrase such as "mental health professional." This phrase has been adopted

provided under Florida law,[2] *amici* believe that their views regarding this latter issue will be useful to the Court's deliberations.

Although *amici* do not address in this brief the question whether States are prohibited by the Eighth Amendment's prohibition against cruel and unusual punishment, or by the Due Process Clause of the Fourteenth Amendment, from carrying out the death penalty against individuals who are presently incompetent, for the purpose of presenting their argument, *amici* will assume that, whether as a substantive constitutional right or as an interest entitled to federal due process protections, Florida constitutionally may not execute mentally incompetent individuals.[3]

Under either the enhanced reliability standard for imposing capital punishment under the Eighth Amendment or the procedural due process standards of the Fourteenth Amendment, the procedures followed by the State of Florida in evaluating Petitioner's competency to be

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by the American Bar Association, on the recommendation of an interdisciplinary task force composed of lawyers, psychologists, psychiatrists and other mental health professionals, including formal representatives of the American Psychological Association and the American Psychiatric Association, in its recently adopted Criminal Justice Mental Health Standards. *See* ABA Standards for Criminal Justice (1984), Standard 7-1.1 *et seq.*

[2] *Fla. Stat.* § 922.07(2) provides that a condemned prisoner is incompetent to be executed upon a determination by the Governor, after professional examination of the prisoner, that the prisoner lacks "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him." This test requires the assessment of primarily cognitive abilities.

[3] *Amici*'s decision not to address the question *whether* Petitioner has a constitutional right not to be executed while mentally incompetent reflects *only* their judgment that, in light of their special expertise, *amici*'s views would be most useful to the Court's deliberations on the issues addressed herein. Nevertheless, *amici* believe that the arguments presented to the Court by Petitioner's counsel on the underlying constitutional issues are soundly based in the prior holdings of the Court.

executed were inadequate. Although Petitioner does not now challenge the validity of his conviction and sentencing, because of the consistent recognition by this Court of the "qualitative difference" between the penalty of death and other punishments, *California v. Ramos*, 463 U.S. 992, 998 (1983); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), the requirement that procedural safeguards be observed to ensure accuracy and reliability in the guilt and sentencing phases of capital proceedings should be extended to proceedings in the post-sentencing phase in which competency for execution is evaluated.[4]

Because of the critical role that adversarial debate plays in the "truth-seeking" process, *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (plurality opinion), *amici* urge this Court, whenever there is reasonable cause to believe that a condemned prisoner lacks the mental competency to be executed, and there is a factual dispute as to that issue, to require a full and fair adversarial hearing on the issue of his or her competency.[5] *Amici* further urge the Court's recognition, as a requirement of due process, of the effective assistance of mental health professionals, and the appointment of such professionals in the case of indigents, to conduct appropriate examinations of condemned prisoners and to assist them and their attorneys in evaluating and preparing all issues relevant to the accurate determination of their present competency to

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[4] *See also Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion) (and cases cited therein). *See generally Ake v. Oklahoma*, 105 S.Ct. 1087, 1099 (1985) (Burger, C. J., concurring).

[5] Because the constitutional right not to be executed while incompetent is no less important than the right not to be tried while incompetent, the threshold inquiry for requiring a hearing on a condemned prisoner's competency to be executed should be whether there is "reasonable cause" to question, or "sufficient doubt" as to, the prisoner's competency. *See generally Drope v. Missouri*, 420 U.S. 162, 173, 180 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

be executed. Finally, *amici* urge the Court to require written statements by decisionmakers specifying the facts relied upon in determining a condemned prisoner's competency to be executed, to ensure that proper procedural and substantive standards are observed by the State in competency proceedings. The procedures provided by *Fla. Stat.* § 922.07 for determining the competency of condemned prisoners failed in all of these respects to provide Petitioner adequate protection of his constitutional right not to be executed at this time.

Apart from the general right of condemned prisoners in Petitioner's circumstances to the assistance of a mental health professional, the mental status examination of Petitioner which was conducted by the psychiatrists appointed by the Governor pursuant to *Fla. Stat.* § 922.07 failed to meet the relevant professional standards of mental health professionals engaged in forensically-oriented clinical evaluations.

As a result of these procedural inadequacies and professional deficiencies, the determination that Petitioner is competent to be executed fails the enhanced reliability and heightened procedural fairness standards of the Eighth and Fourteenth Amendments.

ARGUMENT

I. CONDEMNED PRISONERS OF QUESTIONABLE MENTAL COMPETENCY MAY NOT BE EXECUTED WITHOUT FIRST HAVING THEIR COMPETENCY DETERMINED THROUGH AN ACCURATE AND RELIABLE FACTFINDING PROCEEDING.

The question presented by this case is whether the constitutional requirement that adequate procedural safeguards be observed to ensure accurate and reliable determinations in the guilt and sentencing phases of capital punishment should be extended to proceedings where the State determines a condemned prisoner's competency

to proceed with the execution. This Court has recognized consistently the special nature of capital cases and has construed the Constitution to require adherence to the highest standards of procedural fairness in imposing the death penalty. Because the death penalty is "unique in its severity and irrevocability," and because of the fundamental nature of the individual interest that is at stake in death penalty proceedings, the Court has imposed procedural standards designed to minimize the possibility of erroneous determinations in such proceedings. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion), citing *Furman v. Georgia*, 408 U.S. 238, 286-91, 306 (1972) (concurring opinions of Brennan and Stewart, JJ.). *See, e.g., Ake v. Oklahoma*, 105 S.Ct. 1087, 1099 (1985) (Burger, C.J., concurring in judgment); *Lockett v. Ohio*, 438 U.S. at 604; *Gardner v. Florida*, 430 U.S. at 357; *Woodson v. North Carolina*, 428 U.S. at 305.

These standards require individualized consideration of all factors relevant to the determination to impose capital punishment as a means of ensuring that "the death penalty is not meted out arbitrarily or capriciously," but rather in a consistent and reasoned manner. *California v. Ramos*, 463 U.S. at 992; *Lockett v. Ohio*, 438 U.S. at 601; *Gregg v. Georgia*, 428 U.S. at 188-89.[6] The Court has required further that adequate procedural safeguards be followed in capital proceedings to ensure the accuracy

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[6] Because "the imposition of death by public authority is so *profoundly different* from all other penalties, . . ." *Lockett v. Ohio*, 438 U.S. at 605 (Burger, C. J.) (emphasis added), individuals subject to capital punishment must be permitted to present any mitigating evidence that is relevant to the decisionmaker's determination of the appropriateness of capital punishment in their particular cases, and such evidence must be considered by the decisionmaker. *Woodson v. North Carolina*, 428 U.S. at 304. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982). Without informed decisionmaking, " 'the system cannot function in a consistent and rational manner.' " *Gregg v. Georgia*, 428 U.S. at 189, quoting the American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.1(a), Commentary, p. 201 (App. Draft 1968).

of the information used by decisionmakers and the reliability of the determination that "death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 304, 305.

Although the Court has not had occasion to address the specific applicability of these procedural requirements to post-sentencing competency proceedings in light of contemporary Eighth and Fourteenth Amendment standards,[7] the constitutional values of consistent, reasoned determinations and enhanced reliability in imposing capital punishment are no less compelling in the context of post-sentencing competency determinations.[8] Chief Jus-

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[7] The court of appeals' reliance on *Solesbee v. Balkcom*, 339 U.S. 9 (1950), and *Caritativo v. California*, 357 U.S. 549 (1958), is misplaced. *See Ford v. Wainwright*, 752 F.2d 526, 528 (11th Cir. 1985). Because these decisions predate significant developments in Eighth and Fourteenth Amendment jurisprudence, their applicability in the context of this case is severely limited. First, *Solesbee* and *Caritativo* did not purport to consider whether the Constitution imposed any substantive prohibitions on the execution by States of mentally incompetent prisoners because the Eighth Amendment's prohibition against cruel and unusual punishment was not applicable to the State until 1962. *See Robinson v. California*, 370 U.S. 660 (1962). Second, although *Solesbee* and *Caritativo* did address the procedural issue of what process was due in these circumstances, the requirements of enhanced reliability and consistent, reasoned decisionmaking in capital sentencing imposed by this Court in *Furman* in 1972 and its progeny has rendered impermissible under the Eighth and Fourteenth Amendments many sentencing practices that were approved previously under the Due Process Clause. *See Lockett v. Ohio*, 438 U.S. at 599; *Gregg v. Georgia*, 428 U.S. at 195-96 n.47. Third, *Solesbee* and *Caritativo* were decided before this Court accorded state-created "objective expectation[s]" the procedural protections of the Due Process Clause. *Vitek v. Jones*, 445 U.S. 480, 489 (1980). *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (and cases cited therein).

[8] In addition to the constitutional values underlying the right not to be executed while mentally incompetent, there are several bases, recognized historically at common law, for prohibiting the execution of mentally incompetent prisoners. *See generally Ford v. Wainwright*, 752 F.2d at 531 (Clark, dissenting).

tice Burger's observation in *Lockett v. Ohio* regarding capital sentencing is even more apt with respect to post-sentencing capital determinations: "The nonavailability of corrective or modifying mechanisms with respect to an *executed* capital sentence underscores the need for individualized consideration [and accurate factfinding] as a constitutional requirement [in these proceedings]." 438 U.S. at 605 (emphasis added).

Assuming the Court recognizes in this case a constitutional right not to be executed while incompetent, " 'the determination of [prisoners' competency to be executed] is critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.' " *Vitek v. Jones*, 445 U.S. 480, 491 (1980), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).[9] This Court consistently has recognized that " 'the adequacy of statutory procedures for deprivation of a statutorily created [life, liberty or] property interest must be analyzed in [federal] constitutional terms.' " 445 U.S. at 490-91, n.6, quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part) (and cases cited therein). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Balancing the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), as critical to the determination of what process is due, it is clear that federal due process demands as heightened

[9] Even where the entitlement is based on a state-created right rather than a substantive federal constitutional right, the minimum due process requirements are "a matter of federal law [and] are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." 445 U.S. at 491. Nor does the fact that certain determinations are primarily medical or psychological in nature, and that States rely "on the opinion[s] of . . . designated physician[s] or psychologist[s] for determining whether the conditions warranting [deprivation of a protected interest] exist[,] . . . remove[] the prisoner's interest from due process protection[] or answer[] the question of what process is due under the Constitution." *Id.*

procedural protections in determining *present* eligibility for the death penalty as are required in the initial guilt and sentencing phases of capital proceedings.[10]

Those protections include the opportunity to review and challenge the accuracy of information upon which the sentencing authority relies in imposing capital punishment, *see Gardner v. Florida*, 430 U.S. 349 (1977); the assistance of a competent mental health professional, and appointment of such a professional for indigents, "in [the] evaluation, preparation, and presentation of" all issues relevant to the defense, *Ake v. Oklahoma*, 105 U.S. at 1097; and a written statement by the sentencing authority of the evidence relied on and the reasons for the imposition of capital punishment, to ensure adherence to proper substantive and procedural standards. *See Gregg v. Georgia*, 428 U.S. at 195. These measures, which seek to ensure consistency and reliability in the imposition of capital punishment, are "a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson v. North Carolina*, 428 U.S. at 304, including the actual execution of the death sentence. The absence of these safeguards in the State's determination of competency to be executed creates a constitutionally intolerable risk of erroneous deprivation of life.

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[10] The three factors identified by the Court as relevant to the determination of what process is due before an individual may be deprived by governmental action of a protected life, liberty or property interest are: 1) the private interest that will be affected by the governmental action; 2) the governmental interest that will be affected if the proposed safeguard is provided; and 3) "the probable value of the additional . . . procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake v. Oklahoma*, 105 S.Ct. at 1094. *See Mathews v. Eldridge*, 424 U.S. at 335.

A. Accurate And Reliable Factfinding On The Issue Of Mental Competency Requires An Adversary Hearing Where The Issue Of Competency Is Disputed.

The Due Process Clause requires that before individuals are finally deprived of a constitutionally protected interest, they must be provided "*some* form of hearing" in which to present their case and have its merits fairly judged. *Board of Regents v. Roth*, 408 U.S. at 570-71, n.8. The nature of the required hearing, however, "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Weighing, under *Mathews*, the private and governmental interests at stake in light of the probable contribution that adversary hearings will make to the consistency and reliability of competency determinations, the balance tips overwhelmingly in favor of providing condemned prisoners a meaningful opportunity to review and challenge the factual bases of the State's determinations regarding their mental status.

It cannot reasonably be disputed that "[t]he private interest in the accuracy of a . . . proceeding that places an individual's life . . . at risk is almost uniquely compelling." *Ake v. Oklahoma*, 105 S. Ct. at 1094. Although condemned prisoners may have forfeited some constitutional protections by virtue of having been duly convicted and sentenced to death, assuming the execution of incompetent prisoners is forbidden under federal or state law, such prisoners must be considered to possess a "residuum" of "life" interest so long as they are incompetent. Thus, condemned prisoners of questionable competency retain a powerful interest in the reasoned determination, based on reliable factfinding, of their competency to be executed.

Likewise, the State has a compelling interest in ensuring the accuracy and reliability of competency proceedings. Indeed, the State's interest in assuring that its "ultimate sanction" is not erroneously carried out is "profound." *Id.* at 1097. The State has additional in-

terests in the deterrent and retributive values of enforcing sanctions that have been lawfully imposed by its criminal process, unimpeded by delays and additional administrative or financial burdens. However, unlike a private adversary, the State must temper its interest in efficient enforcement of the death penalty with its larger interest in preserving the constitutional integrity of its criminal justice system. *Id.* at 1095.

The safeguard of an adversary hearing, in which prisoners are permitted to review and challenge evidence of their competency that is adduced by the State, enhances substantially the likelihood of accurate determinations of competency. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977). Although providing condemned prisoners with such an opportunity may cause delays in the administration of their ultimate punishment, those costs are clearly outweighed by the benefits of allowing the adversary process to sharpen and refine the evidentiary bases on which determinations are made to carry out "this most irrevocable of sanctions." *Gregg v. Georgia*, 428 U.S. at 182.

In *Gardner v. Florida*, the Court held that the Due Process Clause required an opportunity for adversarial debate on "confidential" presentence reports on which the State intended to rely in a capital sentencing proceeding. Regarding the State's interest in avoiding delay, the Court stated that delay could be avoided if the decisionmaker disregarded any material in the report which was contested by the defendant. If, however, the contested material was "of critical importance [and therefore would be used by the decisionmaker in sentencing the defendant], the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." *Id.* at 359-60.

Similarly, the Court cautioned that "consideration must be given to the quality, as well as the quantity, of the information on which the [decisionmaker] may rely" in imposing the death penalty. *Id.* at 359. Information

that has not been subjected to the "truth-seeking function" of the adversary process is inherently less reliable than information that has been so tested. This is particularly true with mental health assessments. As the Court has noted, mental health professionals "disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior symptoms. . . ." *Ake v. Oklahoma*, 105 S.Ct. at 1096. The same uncertainties in mental health assessments that the Court has noted in the contexts of civil commitment, the insanity defense and incompetence to stand trial [11] are equally applicable in the context of determinations of competency to be executed. Indeed, because questions of competency in this context arise only after the individual has already been determined to have been competent to stand trial, and not insane at the time of the offense, the symptoms of mental disorder at this stage can be particularly "elusive and often deceptive," and therefore difficult to assess. *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950). Thus, allowing condemned prisoners whose competency is questionable to call witnesses, cross-examine the State's mental health experts, and present arguments and mental health experts on their own behalf is especially necessary to reduce to a constitutionally tolerable level the risk of erroneous deprivation of life.

Even where the private interest at stake is less than life, the Court has rejected deprivation by the State of an individual's constitutionally-protected interest in the absence of an adversary hearing. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Court held that a prisoner's liberty interest was violated by his classification as mentally ill and involuntary transfer to a mental hospital for psychiatric treatment without adequate procedural protections. Although recognizing the State's "strong" interest

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[11] *See generally, Addington v. Texas*, 441 U.S. 418, 429-30 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Greenwood v. United States*, 350 U.S. 366, 375-76 (1956); *Solesbee v. Balkcom*, 339 U.S. 9 (1950).

in segregating and treating mentally ill patients, the Court found the prisoner's state-created interest in not being "arbitrarily classified as mentally ill and subjected to unwanted treatment . . . powerful." *Id.* at 495. These and other considerations, including the substantial risk of error in making the required mental health assessments under the statute, led the Court to require adequate procedural safeguards in making these determinations.[12] Recognizing that the inquiry in *Vitek* was "essentially medical . . . 'turn[ing] on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists,'" the Court stated that "[t]he medical nature of the inquiry, however, [did] not justify dispensing with due process requirements." 445 U.S. at 495, quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979). Rather, "[i]t is *precisely* [*because* of] '[t]he subtleties and nuances of psychiatric diagnoses' that . . . adversary hearings [are required]." *Id.*, *quoting* 441 U.S. at 430 (emphasis added).

B. Accurate And Reliable Factfinding On The Issue Of Mental Competency Requires The Assistance Of Mental Health Professionals In The Evaluation And Preparation Of All Issues Relevant To Determining Condemned Prisoners' Competency.

A ruling that due process requires access to competent mental health professionals to examine and meaningfully assist prisoners during competency hearings is an appropriate accommodation of the competing interests of the State and condemned prisoners. This requirement necessarily includes the appointment of mental health professionals to assist indigent condemned prisoners of questionable competency. *See Ake v. Oklahoma*, 105 S.Ct.

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[12] The procedural safeguards included, *inter alia*, a hearing at which: the State is required to disclose the evidence on which it intends to rely; prisoners are given an opportunity to be heard in person and to present contrary documentary evidence; and prisoners are provided an opportunity to present testimony by their own witnesses and to confront and cross-examine witnesses called by the State.

1087 (1985). Both the State and condemned prisoners have a very substantial interest in the fair and accurate adjudication of condemned prisoners' competency to be executed. The State has additional interests, however, in avoiding the financial and administrative burdens that providing condemned prisoners with the assistance of mental health professionals would impose on its criminal justice system. However, in light of the compelling interests of both the State and the individual in accurate dispositions, it is clear that those governmental interests are "not substantial." *Ake v. Oklahoma*, 105 S.Ct. at 1095.

Balancing these private and governmental interests in light of "the probable value of [the assistance of a mental health professional], and the risk of erroneous deprivation of the [prisoner's life] if [such a safeguard] is not provided," the weight favors providing the assistance of independent mental health professionals to prisoners of questionable competency. *Ake v. Oklahoma*, 105 S.Ct. at 1094. Providing such prisoners with independent mental health professionals who will conduct appropriate examinations, challenge the findings of State experts, and provide other relevant assistance will contribute to the adversarial debate and thereby enhance the decisionmaker's ability to make a reliable and informed determination.

In *Ake*, the Court, recognizing the "pivotal role" that mental health professionals have come to play in criminal proceedings, acknowledged that when "the defendant's mental condition [is] relevant to . . . the punishment he might suffer, the assistance of a [mental health professional] may well be crucial to the defendant's ability to marshal his defense." 105 S.Ct. at 1095. In such cases, because "the risk of inaccurate resolution of sanity issues [would be] extremely high" without such assistance, fair adjudication at the guilt and sentencing phases of capital cases requires, "at a minimum, [that the State] assure the defendant access to a competent [mental health professional] who will conduct an appropriate examina-

tion and assist in the evaluation, preparation, and presentation of the defense." *Id.* at 1097.

As in the guilt and sentencing phases of criminal proceedings, when a condemned prisoner's mental condition is relevant to the determination whether to proceed with a death sentence, the assistance of a mental health professional becomes critical to the fair and accurate determination of the prisoner's competency to be executed. A mental health professional retained or appointed to assist the prisoner will be able to examine the prisoner and conduct relevant tests over the period of time necessary to produce an accurate mental assessment, will provide the trusting relationship necessary to evoke the candid and spontaneous disclosures upon which accurate assessment depends, and will provide meaningful assistance to the prisoner and counsel in reviewing and responding to the reports of the State's mental examiners.[13]

The client-clinician relationship is particularly important in this context because the symptoms of psychological distress caused by the imminence of one's execution may not always manifest themselves in obviously aberrational behavior. In addition, because the psychological stress that accompanies living under a sentence of death can cause condemned prisoners to develop defensive mechanisms to cope with the stress, the mental health professional must be sensitive to the degrading nature of the forces—and their physical, psychological, and emotional impact—that uniquely press upon prisoners awaiting ex-

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[13] Although Petitioner was evaluated by two mental health professionals, the reports of those evaluations were neither submitted to the Governor, nor referred to in the state-appointed psychiatrists' reports to the Governor, for his consideration in determining Petitioner's competency to be executed. Moreover, the absence of an adversarial proceeding precluded any meaningful assistance to Petitioner by these professionals, *e.g.*, helping to prepare the cross-examination of the State psychiatrists, giving testimony on behalf of Petitioner.

ecution.[14] To assess fully the effects that these defensive mechanisms have on a condemned prisoner's rational and factual understanding of his or her fate, *i.e.*, competency to be executed, the mental health professional must possess the time and the skill essential to developing a relationship with the prisoner that will provide the necessary access to the prisoner's psychological composition.

The provision of such assistance to prisoners of questionable competency will enhance significantly the likelihood of an accurate determination of the prisoner's competency to be executed: "By organizing [the prisoner's] mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the [decisionmaker], [mental health professionals] for each party enable the [decisionmaker] to make its most accurate determination of the truth of the issue before [it]." *Ake v. Oklahoma*, 105 S.Ct. at 1096.[15]

Thus, a proper balancing of interests, "where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, . . . requires access to a [mental] examination on relevant issues, to the testimony of the [mental health professional], and to assistance in preparation at the [post-sentencing competency evaluation] phase." *Id.* at 1097.

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[14] For example, a common reaction to the extreme anxiety and stark terror that many prisoners experience when confronted with the imminence of their death is the suppression of that reality by a variety of psychological defense mechanisms, including denial by delusion formation, denial by minimizing their predicament, projection, and obsessive preoccupation with religious, intellectual or philosophical matters. *See generally* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIAT. 393 (1962).

[15] This is especially true given the frequency and breadth of disagreement that may obtain in mental evaluations of the same individual. *See* p. 12, *supra*.

C. Accurate And Reliable Factfinding On The Issue Of Mental Competency Requires Decisionmakers To Specify In Writing The Factors Relied Upon In Making Competency Determinations.

The requirement that decisionmakers in capital cases specify in writing the factors relied upon in reaching their decision to impose capital punishment has been recognized by the Court as necessary "to ensure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia*, 428 U.S. at 195.[16] The requirement of written findings forces decisionmakers to focus more closely on the reasons underlying their decisions, and thereby enhances the likelihood of compliance with the required standards for imposing or proceeding with capital punishment.[17] Written findings also provide an adequate basis for a collateral challenge to the constitutionality of competency proceedings, as well as for meaningful appellate review in those jurisdictions where such review is provided. In this way, the requirement of a written record satisfies the requirements of reasoned, consistent decisionmaking and enhanced reliability which have been articulated by this Court as the touchstones of constitutionally adequate decisionmaking in capital cases.

These protections are no less critical when the interests of condemned prisoners are balanced against those of the

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[16] Even in the noncapital context, the Court has recognized in certain circumstances that the proper balancing of individual interests and governmental interests demands a "written statement by the factfinder as to the evidence relied on and the reasons for [the deprivation of the individual's protected interests]." *Vitek v. Jones*, 445 U.S. at 495.

[17] *See also Gardner v. Florida*, 430 U.S. at 361 ("[I]t is important that the record . . . disclose . . . the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*.") (footnote omitted).

State. Both the State and the questionably competent prisoners whose lives are at stake have a "compelling interest" in the accurate and reliable assessment of the prisoners' mental competency. *Ake v. Oklahoma*, 105 S.Ct. at 1095. The State's additional interests in financial and administrative economy are taxed only incrementally by requiring the decisionmaker to provide a written statement of the evidence relied on in determining the prisoner's competency. Indeed, the absence of such a statement, should the prisoner challenge the constitutionality of the State's determination in collateral or appellate proceedings, could require the State to bear the expense of an additional fact-finding hearing. Thus, on balance, due process requires that decisionmakers support their determinations that condemned prisoners of questionable competency are fully competent to be executed with written statements of their findings of fact.

II. THE PROCEDURES FOLLOWED BY THE STATE OF FLORIDA IN EVALUATING PETITIONER'S COMPETENCY TO BE EXECUTED FAILED TO PROVIDE AN ACCURATE AND RELIABLE DETERMINATION ON THE ISSUE.

Pursuant to *Fla. Stat.* § 922.07, "[w]hen the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." § 922.07(1). The Governor is required under the statute to instruct the examiners in writing "to determine whether [the condemned person] understands the nature and effect of the death penalty and why it is to be imposed upon him." *Id.* If, after receiving the reports from the commission, the Governor determines that the convicted person "has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant." § 922.07(2).

Following these procedures, on October 20, 1983, Petitioner's counsel advised the Governor that Petitioner's mental condition had deteriorated to the point where his sanity was questionable, and sought the appointment of a commission of psychiatrists.[18] Three psychiatrists were appointed and, on December 19, 1983, as provided by statute, they examined Petitioner "with all three psychiatrists present at the same time [along with Petitioner's] [c]ounsel . . . and the state attorney . . . ." § 922.07(1). The "examination" consisted of a one-half hour interview with Petitioner in the prison courtroom,[19] conversations with the prison's medical and correctional staff, inspection of Petitioner's cell, and, in some cases, review of materials provided by Petitioner's counsel [20] which con-

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[18] Petitioner had been examined by a psychiatrist in July, 1981 in connection with unsuccessful clemency proceedings. Because of the deterioration of Petitioner's mental state, Petitioner's counsel arranged for Petitioner to continue seeing that psychiatrist on a therapeutic basis. Appendix to Petition for Certiorari (hereafter "*App.*") at 94a. In August, 1982, Petitioner discontinued therapy because he believed the psychiatrist was conspiring against him in concert with the Ku Klux Klan. *Id.* In January, 1983, because Petitioner wanted to dismiss his appeals and submit to execution, Petitioner's counsel sought evaluation of Petitioner's mental condition by a second psychiatrist in order to assess Petitioner's competency to make such a decision. *Id.* at 97a. Petitioner refused to see this psychiatrist—and anyone else, including family and counsel—until November, 1983. *Id.*

[19] Also present during the interview were "one or two correctional officers" and two paralegals. Petition for Writ of Certiorari at 37.

[20] Although Petitioner's counsel provided these materials to the commission psychiatrists as background information prior to their interview, whether, and to what extent, these materials were actually reviewed by the psychiatrists is unclear. Two of the three commission members stated in their reports that they had reviewed the materials, but their reports did not even address, much less account for, the pervasive evidence in those materials of Petitioner's delusional processes. *See App.* 160a-166a. The third psychiatrist refused to accept the materials until *after* the interview, and *one* day before he submitted his report to the Governor. He made no reference in his report to having reviewed the materials. *See id.* at 160-62a.

tained portions of the trial transcript, copies of Petitioner's correspondence, reports of two earlier psychiatric exams, and Petitioner's medical history. Included in the reports of the two prior examiners, both of whom examined him over a significantly longer period than the commission psychiatrists and one of whom had been Petitioner's treating therapist, were the following observations: "[Petitioner's] mental disorder is severe enough to substantially affect [his] present ability to assist in the defense of his life[;]" "[Petitioner's] psychotic disorder [is] so severe that it suicidally compels him to embrace his own death[;]" and "[Petitioner] lacks the mental capacity to understand the reasons why [the death penalty] is being imposed on him." *App.* at 155a, 158a.[21]

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[21] *See* n.18, *supra*. The first psychiatrist, Petitioner's treating therapist, concluded, based on: 1) four in-person evaluations between July, 1981 and August, 1982; 2) taped conversations and letters between Petitioner and his family, friends and attorneys; 3) interviews with other individuals having had direct observations of Petitioner's behavior during that period; 4) psychological and psychiatric evaluations by the prison mental health staff; and 5) prison medical records, that Petitioner suffers from:

> a severe, uncontrollable, mental disease which closely resembles "Paranoid Schizophrenia With Suicidal Potential". This major mental disorder is severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life.
>
> It should be noted that Mr. Ford's ambivalence around whether to continue his legal fight is in and of itself an indication of a psychotic disorder so severe that it suicidally compels him to embrace his own death.

App. at 155a.

The second psychiatrist concluded after a three-hour interview that Petitioner suffers from "schizophrenia, undifferentiated type, acute and chronic," as a result of which,

> while he *does* understand the nature of the death penalty, *he lacks the mental capacity to understand the reasons why it is being imposed on him.* His ability to reason is occluded, disorganized and confused when thinking about his possible execution. *He can make no connection between the homicide he com-*

After their examination, notwithstanding the prior evaluations of Petitioner, all three psychiatrists reported to the Governor that although Petitioner suffered from a "severe adaptational disorder," [22] "psychosis with paranoia," [23] or "serious emotional problems . . . [so] profound[] . . . it forces [one] to put a 'psychotic' label on [Petitioner]," [24] he "ha[d] enough cognitive functioning" to satisfy Florida's competency standard.[25] On April 30, 1984, without any further proceedings, the Governor signed Petitioner's death warrant.

Measured against the constitutionally-mandated standard in capital cases of enhanced reliability and consistent, reasoned determinations, the procedures by which Petitioner's competency was evaluated were grossly inadequate. First, although § 922.07(1) authorizes the appointment of counsel to "represent" condemned prisoners during competency evaluations, there is no provision in the statute for adversary participation by prisoners'

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mitted and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the Governor and control him, President Reagan's interference in the execution process, etc.

App. at 158a (emphases added).

[22] *App.* at 161a. The "disorder," however, "seem[ed] contrived and recently learned" and, therefore, not a "natural insanity." *Id.* at 162a. *But see* earlier report of non-commission psychiatrist:

> [Petitioner] is suffering from schizophrenia, undifferentiated type, acute and chronic. The delusional material, the free-floating and disorganized ideational and verbal productivity, and his flatness of affect are the highlights of the signs leading to this diagnosis of psychosis. *The possibility that he could be lying or malingering is indeed remote in my professional opinion.*

Id. at 100a (emphasis added).

[23] *Id.* at 164a.

[24] *Id.* at 166a.

[25] *Id.* at 164a.

counsel or by independent mental health experts.[26] The absence of any adversarial debate on the issue of Petitioner's competency deprived the Governor of the opportunity to test the accuracy of the conclusions reached by the three state-appointed psychiatrists.

The opportunity to challenge the commission's findings was especially critical to a proper determination by the Governor of Petitioner's competency because, although all of the examiners agreed that Petitioner suffers from some form of serious mental disorder, they disagreed as to the severity of his mental disorder. Moreover, the commission's conclusions differed radically from the conclusions of two other psychiatrists who earlier had performed more extensive and comprehensive examinations of Petitioner, with no indication that these earlier conclusions had been considered by the three State psychiatrists or reconciled with the conclusions they reported to the Governor. Because Petitioner was not given an opportunity to respond to the findings of the commission examiners, the quality of those findings was untested by the "truth-seeking function" of the adversary process, and were inherently unreliable. *See Gardner v. Florida*, 430 U.S. at 359. This conclusion is especially warranted because the decisionmaker—the Governor—was a lay person who lacked the specialized knowledge and training necessary to evaluate the conflicting evidence, at least without the benefit of an adversarial hearing. In view of these procedural deficiencies, the risk of error to which the determination of Petitioner's competency was subjected is constitutionally intolerable.

Like the absence of a hearing, the failure to provide Petitioner with the meaningful assistance of a competent mental health professional during these proceedings pre-

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[26] Indeed, in construing this statute, the Florida Supreme Court approved the Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode v. Wainwright*, 448 So.2d 999, 1001 (Fla. 1984).

cluded the Governor's individualized consideration of all relevant factors and substantially undermined the possibility of accurate factfinding. Although Petitioner's mental condition was evaluated by two psychiatrists prior to the § 922.07 proceeding, the failure to provide for meaningful participation in the proceedings by these professionals resulted in the exclusion of highly probative evidence on the issue of Petitioner's competency. Not only were the comprehensive reports of these professionals not considered by the Governor,[27] but he was not even made aware of the *existence* of these reports by the commission psychiatrists. Nor were the commission psychiatrists required to explain, deny, or otherwise account for the extensive documentation by these professionals of Petitioner's psychotic delusional processes, and their conclusions that Petitioner's severe psychosis "suicidally compels him to embrace his own death" and that he "lacks the mental capacity to understand the reasons why [the death penalty] is being imposed on him." *App.* at 155a, 158a. Thus, the Governor's decision was based upon partial and unchallenged information of highly questionable accuracy. This exclusion of highly relevant information is inconsistent with the constitutional requirement that the decisionmaker in capital proceedings "possess[] the fullest information possible concerning the defendant's life and characteristics," including any mitigating evidence. *Lockett v. Ohio*, 438 U.S. at 603, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

The failure to provide Petitioner with an adversary proceeding in which he could be assisted meaningfully by competent mental health professionals is especially egregious in view of the nature of the "examination" conducted by the state-appointed psychiatrists. As noted above, their "examination" consisted of a one-half hour interview with Petitioner in the prison courtroom, con-

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[27] There is no provision in the statutory scheme of § 922.07 for submitting materials other than those prepared by the commission psychiatrists to the Governor.

versations with the prison staff, inspection of Petitioner's cell and cursory review, at best, of background materials containing Petitioner's medical history and reports of other psychiatric evaluations. These procedures fall significantly below the generally accepted standard of care necessary to produce reliable forensic mental health evaluations.[28]

First, "[b]ecause psychological states are complex and fluctuate, a single and relatively brief examination is . . . inadequate." J. ZISKIN, 2 COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 13 (3d ed. 1981). *See also* Ziskin, *Giving Expert Testimony: Pitfalls and Hazards for the Psychologist in Court*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 101 (G. Cooke, ed. 1980) ("[A] single examination even of two to three hours duration, is insufficient . . . . [M]aterial elicited in a single session might be quite different a week later in the same individual . . . . [I]t is advisable to spread the examination over at least two and preferably three sessions."). Manifestations of schizophrenia "are present one day and not the next. They are revealed to one examiner and not to another . . . . A complete account of a patient's symptomotology, therefore, demands that he be observed over an extended period of time." L. BELLAK & L. LOEB, THE SCHIZOPHRENIC SYNDROME, 337-38 (1969), cited in *Hays v. Murphy*, 663 F.2d 1004, 1012 n.13 (10th Cir. 1981) (discussion of competency to bring habeas proceeding on one's own behalf). A one-half hour examination fails to provide a sufficient basis for an accurate and reliable professional opinion as to a condemned prisoner's competency to be executed.

Proper clinical evaluation also requires the establishment of a trusting relationship with the examiner, in a physical setting that is conducive to evoking the spontaneous and

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[28] *See also* the critical reviews of these procedures by two nationally-known forensic psychiatrists. *App.* at 169a, 187a. *See generally* nn.30, 32, *infra*.

candid exchange with the subject that forms the principal basis for the evaluation. Standard 4.1 of the Standards for Providers of Psychological Services, requires psychologists to "promote the development in the service setting of a physical, organizational, and social environment that facilitates optimal human functioning." [29] *See also* APA, *Specialty Guidelines for the Delivery of Services by Clinical Psychologists* at Guideline 4, 36 AM. PSYCHOL. 640 (1981). The likelihood that, given Petitioner's paranoid condition, the courtroom was inherently "oppressive" to Petitioner and thereby increased the difficulty of establishing trust with his examiners, is substantial. *See generally* Wilson, *Prison As An Environment* in THE ROLE OF THE FORENSIC PSYCHOLOGIST, *supra* at 279. This impression might have been reinforced further by the presence of correctional officers, and numerous other "strange" individuals—including the three psychiatrists—all observing him during the same brief time period. Finally, the very short time period made it extremely unlikely that any of the commission psychiatrists would be able to establish sufficient rapport with Petitioner to evoke reliable data on which to base a valid assessment of his mental condition.[30]

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[29] The Interpretation of this Standard provides in pertinent part:

> As providers of services, psychologists have the responsibility to be concerned with the environment of their service unit, especially as it affects the quality of service, but also as it impinges on human functioning . . . . Physical arrangements and organizational policies and procedures should be conducive to the human dignity, self-respect, and optimal functioning of users, and to the effective delivery of service.

APA, *Standards for Providers of Psychological Services*, 32 AM. PSYCHOL. 495 (1977).

[30] These criticisms were made also by the forensic psychiatrists who reviewed the commission psychiatrists' procedures:

> The conditions under which the interview was conducted, including the amount of time spent interviewing [Petitioner], were unlikely to produce sufficient data for reliable forensic

In addition to the clinical interview, forensically-oriented mental health professionals generally require appropriate physical examinations and certain standard psychological test batteries before rendering an opinion on an individual's mental competency. *See generally* T. BLAU, THE PSYCHOLOGIST AS EXPERT WITNESS (1984); H. KAPLAN, A. FREEMAN & B. SADDOCK, A COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/III (3d ed. 1980). Further psychological assessment was especially important in this case because of the difficulties of establishing verbal communication with Petitioner.[31] Had psychological tests been administered to Petitioner, the commission psychiatrists would not have had to rely "largely on inferential deduction from physical behavioral observation," *App.* at 160a, and other nonverbal indicia, which "greatly enhance the opportunity for error and misinterpretation

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> evaluation. The interview was conducted in a courtroom, and a "room full" of people, including one or more correctional officers, was present. The environment was thus not conducive to the informal, intimate setting which is generally necessary to establish sufficient rapport for a psychiatric interview. In the setting described it would have been extremely difficult for [Petitioner] to fully reveal his problems or the nature of his illness. The thirty minute effort to establish communication under the conditions already noted was also inadequate. On rare occasions some patients can be accurately diagnosed in such a brief period. [Petitioner]'s diagnosis, however, was not easily made due to the unusual nature of his behavior and his unusual method of communicating.

App. at 171a. *See also id.* at 192a.

[31] One of the commission psychiatrists reported that "[t]he interview was conducted with great difficulty from a verbal point of view, since the inmate respond[ed] to questions in a stylized, manneristic doggerel. Thus, an answer to a question might be 'beckon one, come one, Alvin one, Q one, kind one.'" *App.* at 160a.

Another reported that "[Petitioner] did not initially respond but did so after his lawyers encouraged him. Most of his responses to the questions were bizarre. He continued to respond by jibberish talk such as 'break one', 'God one', 'heaven one.'" *Id.* at 163a.

on the part of the examining [clinician]," in assessing Petitioner's competency.[32]

Psychological tests, which measure a variety of factors including intelligence, personality and psychopathology,[33]

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[32] *See* Critique of Forensic Psychiatrist at *App.* 190a:

> [One of the commission psychiatrists] indicated that by his ability to "read between the lines" of verbal responses which [Petitioner] did give that [the psychiatrist] was of the opinion that [Petitioner] knew exactly what was going on[,] but if one relies on the transcript of the interchange between the psychiatrist and [Petitioner] then there is great doubt, at least to this observer, that there was a rational interchange between [Petitioner] and the psychiatrist, because [Petitioner] gave irrelevant responses to questions put to him although the words he used had some association with the questions asked. [Petitioner]'s responses do not indicate he had a rational understanding of the process and in fact some of [Petitioner]'s responses were interpreted by [the psychiatrist] to mean [Petitioner] maintained the belief that he would be spared by the angel of death and this delusional belief is in keeping with other delusional beliefs that [Petitioner] manifested to others in his correspondence.

[33] *See, e.g.*, the Wechsler Adult Intelligence Scale ("WAIS"), the Minnesota Multiphasic Personality Inventory ("MMPI"), the Rorschach Test and the Thematic Apperception Test ("TAT"). The WAIS is the most widely accepted intelligence test for adults. It is administered individually by the examiner, and consists of 11 sub-tests, six comprising the Verbal Scale and five comprising the Performance Scale. The Verbal Scale measures general information, memory, vocabulary, mathematical skills and practical judgment. The Performance Scale measures visual-motor skills as well as more verbally-oriented cognitive skills.

The MMPI is the most commonly used and accepted non-projective test of personality. It consists of 550 affirmative statements to which the testee responds "true", "false", or "cannot say". The MMPI items range widely in content and include such areas as health, psychosomatic symptoms, neurological disorders, and motor disturbances; sexual, religious, political, and social attitudes; educational, occupational, family, and marital questions; and many well-known neurotic or psychotic behavior manifestations, such as obsessive and compulsive states, delusions, hallucinations, ideas of reference, phobias, and sadistic and masochistic trends. The test

permit an accurate assessment of the examinee's functional abilities that are critical to a proper competency determination.[34] In addition, psychological testing may be helpful in demonstrating pathology that is not evident clinically. *See* Cooke, *The Role of the Psychologist in Criminal Court Proceedings*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST, *supra* at 96.[35] Psychological tests may also be useful in assessing the issue of malingering, a concern stated by one of the commission psychiatrists.[36] *See* D. SHAPIRO, PSYCHOLOGICAL EVALUATION AND EXPERT TESTIMONY 188 (1984). The use of psychological tests of intelligence and cognitive capacity is particularly important in jurisdictions such as Florida where the test for mental capacity focuses exclusively on the individual's ability to understand the nature and effect of the death penalty and why it is to be imposed on him. In

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yields a profile analysis based on the interrelationships of the scores on ten clinical scales.

The Rorschach Test and the TAT, which consist of unstructured tasks designed to encourage the free play of the examinee's fantasies, are among the most common projective tests. The test stimuli, Rorschach ink blots or ambiguous depictions in the TAT, are intentionally vague, requiring the examinee to produce responses that reveal psychological facts about himself or herself that otherwise may be hidden, *e.g.*, needs, anxieties, fears, personality structure. These tests are also helpful in assessing the intellectual skills and judgment of the examinee. *See generally* L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING (4th ed. 1984); A. ANASTASI, PSYCHOLOGICAL TESTING (5th ed. 1982).

[34] Most psychological tests are designed to be essentially objective and standardized measures of samples of behavior. A. ANASTASI, PSYCHOLOGICAL TESTING (5th ed. 1982). One influential forensic psychiatrist has commented that psychological tests may be a "more objective method" of evaluation than the clinical interview. Sadoff, *Working with the Forensic Psychologist*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 106, 109 (G. Cooke, ed. 1980).

[35] *See also* Cooke, *An Introduction to Basic Issues and Concepts in Forensic Psychology*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST, *supra* at 7 ("The use of tests provides the psychologist with a tool that may give him data not available to the psychiatrist . . . .").

[36] *See App.* at 162a. *See also* n.22.

such jurisdictions, requiring assessment by psychologists, who are specially trained to assess intellectual ability and cognitive capacity, is critical to a reliable and accurate determination of mental competency. Notwithstanding the standard use of these procedures in clinical evaluations, and their particular appropriateness to the evaluation of Petitioner, the state-appointed psychiatrists failed to refer Petitioner to a competent psychologist for a comprehensive psychological assessment.

The final major respect in which the commission's reports fell below professionally acceptable standards for reliable forensic evaluations is their failure to account for the substantial data, including the opinions of two other psychiatrists who had performed more extensive and comprehensive examinations of Petitioner, that were contrary to the commission's findings. In their reports to the Governor, the commission psychiatrists made no reference at all to the grandiose delusions from which Petitioner suffers, which bear directly on his ability to understand why he is to be executed—the delusions that he has the power to free his family and others held hostage in the State Prison by the Ku Klux Klan, to fire and prosecute the officers responsible for the crisis, to replace the Justices of the Florida Supreme Court, and to stop his own execution. Nor did they account for the professional assessments of the prior examiners. This deliberate ignoring of the conclusions of other practitioners without further explanation severely undermines the credibility of the commission's reports. *See generally* Ziskin, *Giving Expert Testimony: Pitfalls and Hazards for the Psychologist in Court*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST, *supra* at 101.

These professional shortcomings of the state-appointed psychiatrists' evaluations of Petitioner's mental condition, together with the absence of adversarial debate on their findings, the failure to permit Petitioner to submit expert evaluations by his own witnesses, and the failure to require the Governor to make a written record of the

evidence that he relied on in determining that Petitioner is competent to be executed, created a constitutionally intolerable risk that Petitioner will be deprived erroneously of his constitutional right not to be executed while insane. As a result, the procedures followed by the State of Florida in determining Petitioner's competency to be executed failed to meet the heightened standards of procedural fairness required in capital cases by the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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